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Nutrishare, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Nutrishare, Inc., a California corporation,
Plaintiff,
v.
BioRx, LLC, an Ohio Limited Liability
Company,
Defendant.

Case No.

COMPLAINT

1. **Trademark Infringement (Lanham Act § 32(1), 15 U.S.C. § 1114(1))**
2. **Trademark Infringement (Common Law)**
3. **Unfair Competition (Lanham Act § 43(a), 15 U.S.C. § 1125(a))**
4. **Unfair Competition (Cal. Business & Professions Code §§ 17200 et. seq.)**

JURY TRIAL DEMANDED

Plaintiff NUTRISHARE, INC. ("Plaintiff" or "Nutrishare") hereby alleges for its
Complaint against Defendant BIORX, LLC ("Defendant" or "BioRx") as follows:

I.

THE PARTIES

1. Plaintiff is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of the State of California and has its principal place of business in Elk Grove, California. Plaintiff is in the business of providing products and services related to total

1 parenteral nutrition (hereinafter “TPN”) which is the practice of providing nutrients intravenously
2 to individuals who suffer from ailments that deteriorate their gastrointestinal system to such a
3 degree that they can no longer eat and digest foods.

4 2. Upon information and belief, Defendant BioRx is a limited liability company
5 organized and existing under the laws of the State of Ohio, and has its principal place of business
6 in Cincinnati, Ohio. Upon information and belief, Defendant is engaged in the business of
7 providing products and services related to TPN under the business name “NutriThrive,” which is
8 not registered as a formal business entity with the Ohio Secretary of State.

9 II.

10 JURISDICTION

11 3. Jurisdiction in this court is proper under 28 U.S.C. § 1331, 28 U.S.C. § 1338(a),
12 and 15 U.S.C. § 1121 in that this action arises under the Trademark Laws of the United States, 15
13 U.S.C. §§ 1051 *et seq.*

14 4. This Court has jurisdiction over the unfair competition claims alleged herein under
15 28 U.S.C. § 1338(b) in that said claims are joined with a substantial and related claim under the
16 Trademark Laws of the United States, 15 U.S.C. §§ 1051 *et seq.*

17 5. The court also has supplemental jurisdiction over Plaintiff’s state law claim
18 pursuant to 28 U.S.C. § 1367(a) because these claims are so related to Plaintiff’s claims under
19 federal law that they form part of the same case or controversy and derive from a common
20 nucleus of operative fact.

21 III.

22 VENUE

23 6. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b) because (a) the acts
24 of infringement and other wrongful acts alleged herein occurred in the Eastern District of
25 California; (b) Defendant resides in the Eastern District of California under 28 U.S.C. § 1391(b);
26 and (c) Defendant has sufficient connections with the Eastern District of California to make
27 venue proper in this district.

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IV.

FACTUAL BACKGROUND

Plaintiff and its Trademark

7. Nutrishare, Inc. was founded in 1991 by Rod Okamoto and Tom Diamantidis.

8. Nutrishare researches, develops, advertises, markets, and distributes TPN-related products and services to TPN consumers in their home.

9. The “Nutrishare” designation was first used by Nutrishare in 1991 and has been continuously used since that date to identify Nutrishare’s products and services and to distinguish them from those made and sold by others.

10. On September 3, 2002, Nutrishare obtained a registration of the “Nutrishare” word mark in the category of retail pharmacy and mail order services in the field of TPN pharmaceutical solutions, supplies and equipment for TPN patients at their home (Registration No. 2615200). A copy of the Certificate of Registration of the “Nutrishare” mark is attached hereto as Exhibit A. This registration remains in full force and effect.

11. The validity of the “Nutrishare” mark and of the registration of the mark, Nutrishare’s ownership of the mark, and Nutrishare’s exclusive right to use the mark in commerce for the above-mentioned services are incontestable under 15 U.S.C. § 1065, and 15 U.S.C. § 1115(b), as Nutrishare has filed the required affidavit with the USPTO.

12. The “Nutrishare” mark has always been prominently displayed on Nutrishare’s products, letter head, invoices, advertising, and publications, either in standard characters or in conjunction with a logo depicting “Nutrishare” in block letters preceded by the stylized image of a bag and IV catheter.

Defendant’s Infringement

13. On information and belief, BioRx formally launched its “NutriThrive” product line and division on November 18, 2007.

14. On information and belief, NutriThrive is not registered as an entity with the Ohio Secretary of State.

15. On information and belief, BioRx develops, advertises, markets, and distributes

1 TPN-related products and services to TPN consumers in their home under the “NutriThrive”
2 name.

3 16. At all times relevant to this complaint, BioRx has been actually or constructively
4 aware of the “Nutrishare” mark.

5 17. BioRx intentionally and willfully adopted and used a designation, “NutriThrive,”
6 that is confusingly similar to the “Nutrishare” mark.

7 18. BioRx has used the “NutriThrive” designation without Nutrishare’s permission or
8 authority.

9 19. As a result of BioRx’s use of “NutriThrive” in connection with its products and
10 services, consumers have actually been confused, mistaken, or deceived, are likely to be
11 confused, mistaken, or deceived, and will continue to be confused, mistaken, or deceived as to the
12 source of products or services offered by the parties.

13 **V.**

14 **CLAIMS FOR RELIEF**

15 **FIRST CLAIM FOR RELIEF**

16 **(Trademark Infringement – Violation of Lanham Act § 32(1), 15 U.S.C. § 1114(1))**

17 20. Plaintiff realleges and incorporates herein by reference the allegations set forth in
18 paragraphs 1 through 19.

19 21. Because Plaintiff advertises, markets, and distributes its products and services
20 under the “Nutrishare” mark, this mark is the means by which Nutrishare’s products and services
21 are distinguished from the products and services of others in the same or related fields.

22 22. Because of Plaintiff’s long, continuous, and exclusive use of the “Nutrishare”
23 mark, Nutrishare’s customers and referring physicians have come to understand the “Nutrishare”
24 mark as signifying the products and services of Plaintiff.

25 23. Defendant, with constructive and/or actual knowledge of Plaintiff’s mark, has
26 engaged and continues to engage in advertising, marketing, selling or offering to sell in interstate
27 commerce products and services bearing the “NutriThrive” designation. The products and
28 services advertised and sold by Defendant using the “NutriThrive” designation compete directly

1 with products and services offered by Plaintiff using the “Nutrishare” mark. Plaintiff and
2 Defendant also have overlapping customers.

3 24. Defendant’s actions are likely to cause confusion or mistake by members of the
4 public as to the source, origin, affiliation, or sponsorship of the products and services offered by
5 each of the parties.

6 25. Further, Defendant’s activities are likely to lead consumers to conclude,
7 incorrectly, that the infringing products and services that Defendant is developing, advertising,
8 marketing, and distributing originate with or are authorized by Plaintiff, to the damage of
9 Plaintiff, its customers, and the public.

10 26. Upon information and belief, Defendant has developed, advertised, marketed, and
11 distributed the infringing products and services with the purpose of misleading, deceiving, or
12 confusing customers, referring physicians, and the public as to the relationship, affiliation, or
13 sponsorship of its products and services by Nutrishare, and of trading upon Plaintiff’s goodwill
14 and business reputation.

15 27. At a minimum, Defendant acted with full knowledge of Plaintiff’s prior rights in
16 its mark, and with willful, intentional, and/or reckless disregard of Plaintiff’s rights.

17 28. Defendant’s activities constitute infringement of Plaintiff’s federally registered
18 servicemark in violation of the Lanham Act, including but not limited to 15 U.S.C. § 1114(1).

19 29. As a direct and proximate result of Defendant’s acts and practices in violation of
20 15 U.S.C. § 1114(1) as set forth above, Plaintiff has suffered and will continue to suffer injury
21 and damages in an amount according to proof. Moreover, Plaintiff is entitled to treble damages
22 and attorneys’ fees pursuant to 15 U.S.C. § 1117 due to Defendant’s deliberate and unjustified
23 infringement.

24 30. By reason of Defendant’s conduct, Defendant has caused and unless such acts and
25 practices are enjoined by the court, will continue to cause, immediate and irreparable harm to
26 Plaintiff for which there is no adequate remedy at law, including, among other things: (a)
27 continuing harm to the reputation and strength of Plaintiff’s mark as an identification of the
28 source and quality of Plaintiff’s products and services which will be difficult to measure in

1 monetary terms; and (b) continuing confusion in the minds of consumers as to the source, origin,
2 affiliation, or sponsorship of its products and services offered by each of parties.

3 **SECOND CLAIM FOR RELIEF**

4 **(Common Law Trademark Infringement)**

5 31. Plaintiff realleges and incorporates herein by reference the allegations set forth in
6 paragraphs 1 through 30.

7 32. The “Nutrishare” designation is a corporate, business or professional name used by
8 Plaintiff.

9 33. Because Plaintiff advertises, markets, and distributes its products and services
10 under the “Nutrishare” designation, this designation is the means by which Nutrishare’s products
11 and services are distinguished from the products and services of others in the same or related
12 fields.

13 34. Because of Plaintiff’s long, continuous, and exclusive use of the “Nutrishare”
14 designation, Nutrishare’s customers and referring physicians have come to understand the
15 “Nutrishare” designation as signifying the products and services of Plaintiff.

16 35. Defendant, with constructive and/or actual knowledge of Plaintiff’s designation,
17 has engaged and continues to engage in advertising, marketing, selling or offering to sell in
18 interstate commerce products and services bearing the “NutriThrive” designation. The products
19 and services advertised and sold by Defendant using the “NutriThrive” designation compete
20 directly with products and services offered by Plaintiff using the “Nutrishare” designation.
21 Plaintiff and Defendant also have overlapping customers.

22 36. Defendant’s actions are likely to cause confusion or mistake by members of the
23 public as to the source, origin, affiliation, or sponsorship of the products and services offered by
24 each of the parties.

25 37. Further, Defendant’s activities are likely to lead consumers to conclude,
26 incorrectly, that the infringing products and services that Defendant is developing, advertising,
27 marketing, and distributing originate with or are authorized by Plaintiff, to the damage of
28 Plaintiff, its customers, and the public.

1 38. Upon information and belief, Defendant has developed, advertised, marketed, and
2 distributed the infringing products and services with the purpose of misleading, deceiving, or
3 confusing customers, referring physicians, and the public as to the source, origin, affiliation, or
4 sponsorship of the products and services offered by each of the parties, and of trading upon
5 Plaintiff's goodwill and business reputation.

6 39. At a minimum, Defendant acted with full knowledge of Plaintiff's prior rights in
7 its mark, and with willful, intentional, and/or reckless disregard of Plaintiff's rights.

8 40. As a direct and proximate result of Defendant's acts and practices in violation of
9 common trademark laws, Plaintiff has suffered and will continue to suffer injury and damages in
10 an amount according to proof.

11 41. By reason of Defendant's conduct, Defendant has caused and unless such acts and
12 practices are enjoined by the court, will continue to cause, immediate and irreparable harm to
13 Plaintiff for which there is no adequate remedy at law, including, among other things: (a)
14 continuing harm to the reputation and strength of Plaintiff's mark as an identification of the
15 source and quality of Plaintiff's products and services which will be difficult to measure in
16 monetary terms; and (b) continuing confusion in the minds of consumers as to the source, origin,
17 affiliation, or sponsorship of its products and services offered by each of parties.

18 **THIRD CLAIM FOR RELIEF**

19 **(Unfair Competition -- Violation of Lanham Act § 43(a), 15 U.S.C. § 1125(a))**

20 42. Plaintiff realleges and incorporates herein by reference the allegations set forth in
21 paragraphs 1 through 41.

22 43. Because Plaintiff advertises, markets, and distributes its products and services
23 under the "Nutrishare" mark, this mark is the means by which Nutrishare's products and services
24 are distinguished from the products and services of others in the same or related fields.

25 44. Because of Plaintiff's long, continuous, and exclusive use of the "Nutrishare"
26 mark, Nutrishare's customers and referring physicians have come to understand the "Nutrishare"
27 mark as signifying the products and services of Plaintiff.

28 45. Plaintiff is informed and believes, and thereon alleges, that the use by Defendant

1 of its “NutriThrive” designation constitutes deliberate and willful copying of Plaintiff’s
2 “Nutrishare” mark.

3 46. Plaintiff is informed and believes, and thereon alleges, that Defendant’s intention
4 in adopting and using its “NutriThrive” designation was to deceive, mislead, and confuse
5 consumers to enable Defendant to trade off Plaintiff’s reputation and goodwill.

6 47. Defendant, with constructive and/or actual knowledge of Plaintiff’s marks, has
7 engaged and continues to engage in advertising, marketing, selling or offering to sell in interstate
8 commerce products and services bearing the “NutriThrive” designation. The products and
9 services advertised by Defendant using the “NutriThrive” designation compete with the services
10 offered by Plaintiff under the “Nutrishare” mark. Furthermore, Plaintiff and Defendant have
11 overlapping customers.

12 48. Defendant’s actions are likely to cause confusion or mistake by members of the
13 public as to the source, origin, affiliation, or sponsorship of the products and services offered by
14 each of the parties.

15 49. Defendant’s acts constitute unfair competition in violation of 15 U.S.C. § 1125(a).

16 50. As a direct and proximate result of Defendant’s acts and practices in violation of
17 15 U.S.C. § 1125(a) as set forth above, Plaintiff has suffered and will continue to suffer injury
18 and damages in an amount according to proof. Moreover, Plaintiff is entitled to treble damages
19 and attorneys’ fees pursuant to 15 U.S.C. § 1117 due to Defendant’s deliberate and unjustified
20 infringement.

21 51. By reason of Defendant’s conduct, Defendant has caused and unless such acts and
22 practices are enjoined by the court, will continue to cause, immediate and irreparable harm to
23 Plaintiff for which there is no adequate remedy at law, including, among other things: (a)
24 continuing harm to the reputation and strength of Plaintiff’s mark as an identification of the
25 source and quality of Plaintiff’s products and services which will be difficult to measure in
26 monetary terms; and (b) continuing confusion in the minds of consumers as to the source, origin,
27 affiliation, or sponsorship of its products and services offered by each of parties.

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FOURTH CLAIM FOR RELIEF

(Unfair Competition -- California Business and Professions Code § 17200 et. seq.)

52. Plaintiff realleges and incorporates herein by reference the allegations set forth in paragraphs 1 through 51.

53. Defendant, with full knowledge of Plaintiff's mark, has engaged and continue to engage in unfair competition as defined by California Business and Professions Code §§ 17200 et. seq. Specifically, Defendant, with constructive and/or actual knowledge of Plaintiff's mark, has engaged and continues to engage in advertising, marketing, selling or offering to sell in interstate commerce products and services bearing the "NutriThrive" designation. The products and services advertised and sold by Defendant using the "NutriThrive" designation compete with the products and services offered by Plaintiff under the "Nutrishare" mark.

54. Defendant's acts and conduct are likely to confuse the public into believing that the products and services offered by Defendant are sponsored, approved, or authorized by Plaintiff or that Defendant is somehow associated with Plaintiff.

55. Defendant's acts are unlawful and unfair within the meaning of California Business and Professions Code § 17200.

56. Plaintiff is informed and believes, and thereon alleges, that in doing the acts alleged herein, Defendant acted with the intent to damage Plaintiff's ability to compete, dilute Plaintiff's goodwill, and dilute the commercial value of Plaintiff's products and services.

57. As a direct and proximate result of Defendant's above-described unlawful, unfair, and fraudulent business practices, Plaintiff has lost profits and suffered damages and Defendant has been unjustly enriched. Plaintiff is therefore entitled to restitution from Defendant, and Defendant should be ordered to disgorge any and all profits attributable to the acts of unfair and/or unlawful competition alleged herein.

58. As a result of Defendant's above-described unlawful, unfair and fraudulent business practices, Plaintiff has suffered and, unless such acts and practices are enjoined by this Court, will continue to suffer damage to its business, reputation and goodwill. Unless Defendant's acts and practices are enjoined by this court, Defendant's actions are likely to

1 continue to cause consumer confusion as to the source, origin, affiliation, and sponsorship of the
2 products and services offered by the parties.

3 **VI.**

4 **PRAYER FOR RELIEF**

5 As a result of the foregoing, Plaintiff respectfully requests the following relief:

6 1. For a preliminary and permanent injunction, enjoining Defendant and its agents,
7 servants, and employees, and all persons acting under, in concert with, or for it from:

8 a. Using the name “NutriThrive,” or any variation of the term “nutri” as a
9 source identifier for itself, any related entities, or the products and services it offers;

10 b Using the domain name www.nutrithrive.com, or any other domain name
11 involving the term “nutri” or any variation thereof;

12 c. Making any and all references to the term “NutriThrive” in any and all
13 websites, including but not limited to www.nutrithrive.com, www.biorx.com, and any
14 other websites;

15 d. Causing likelihood of confusion, deception, or mistake as to the source,
16 origin, affiliation, or sponsorship of Defendant’s products or services; and

17 e. Otherwise infringing Plaintiff’s “Nutrishare” mark.

18 2. For an accounting of all moneys received by Defendant on account of Defendant’s
19 unlawful competition or as a result of the acts alleged in this complaint;

20 3. For all of Defendant’s profits derived from its infringement of Plaintiff’s
21 trademarks;

22 4. For a disgorgement of profits in the amount of Defendant’s unjust enrichment;

23 5. For damages, including three times the amount of actual damages caused by
24 Defendant’s infringement of Plaintiff’s trademarks;

25 6. That this be declared an exceptional case and that Plaintiff be awarded its
26 reasonable attorneys’ fees expended in this action;

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Int. Cl.: 35

Prior U.S. Cls.: 100, 101 and 102

United States Patent and Trademark Office

Reg. No. 2,615,200

Registered Sep. 3, 2002

**SERVICE MARK
PRINCIPAL REGISTER**

NUTRISHARE

NUTRISHARE, INC. (CALIFORNIA CORPORATION)
10519E STOCKTON BLVD., #160
ELK GROVE, CA 95624

FOR: RETAIL PHARMACY AND MAIL ORDER
SERVICES IN THE FIELD OF TOTAL PARENTERAL
NUTRITION PHARMACEUTICAL SOLUTIONS,
SUPPLIES AND EQUIPMENT FOR TOTAL PAR-

ENTERAL NUTRITION PATIENTS AT THEIR
HOME, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 5-23-1991; IN COMMERCE 7-1-1991.

SER. NO. 76-338,114, FILED 11-13-2001.

STEVEN R. FOSTER, EXAMINING ATTORNEY